No. [illegible]

In the United States Circuit Court of Appeals for the Ninth Circuit

City of Coeur d'Alene, Idaho, a Municipal Corporation; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Alfred Swanson, John Frederick, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Richard Weeks, S. H. McEuen, and J. H. Pointner, Members of the City Council of Said City of Coeur d'Alene, Idaho; and Harold L. Ickes, as Federal Emergency Administrator of Public Works, appellants

v.

The Washington Water Power Company, a Corporation, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

MOTION OF APPELLANT, HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, TO REMAND CASE TO THE DISTRICT COURT AND MEMORANDUM IN SUPPORT THEREOF

JAMES W. MORRIS,
Assistant Attorney General.

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Special Assistant to the Attorney General.

JOHN W. SCOTT,
Special Assistant to the Attorney General.

JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

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Errata

;e 8. Third paragraph, last line: "(83 et seq.)" should read "(85 et seq.)".

12. End of first paragraph, last line: "83 et seq." should read "85 et seq."

13. Fourth line from bottom of first paragraph: the "(d)" should read "(c)".

13. Paragraph 3, third line from top: after the words "Appendix hereto" add in parentheses "(pages 1 to 10)".

16. Tenth line from bottom of page: the word "erros" should read "errors".

19. Seventeenth line from top of page: the sentence "A statute valid as to one set of facts may be invalid as to another." Should be in italics.

23. Next to last line from bottom of page: the word "in" should be inserted between the words "If" and "the".

26. Sixth line from top of page: the word "character," should be inserted after the word "concrete".

26. Seventh line from top of page: the word "constitution" should read "constituting".

28. Second paragraph, second line: "(pages 61 to 63)" should read "(pages 11 to 48)".

51. Twelfth line from bottom of page: the word "Court" should

In the United States Circuit Court of Appeals for the Ninth Circuit

No. ——

City of Coeur D'Alene, Idaho, a Municipal Corporation, et al. Appellants

v.

The Washington Water Power Company, a Corporation, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

MOTION TO REMAND

Now Comes the appellant, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, and respectfully shows to this Court:

I

The final decree (R. 262) entered herein by the District Court of the United States for the District of Idaho, Northern Division, on September 9, 1935, from which the present appeal was taken, enjoins this appellant from lending, giving or granting to the City of Coeur d'Alene, Idaho, any moneys of the United States to be used in the construction of a municipal electric light plant for the generation and distribution of electricity for said city and from

entering into any contract with the city to purchase any of its bonds or to make any loan, gift or grant of moneys to said city for the purpose of constructing or assisting in the construction of a municipal electric power generating and distribution system. Likewise the city and the other appellants, its officers, are also enjoined from proceeding with the issuing, pledging, selling, or delivering any bonds of said city to this appellant. The bill filed by appellee and said decree related to a contract between said city and this appellant (R. 104), executed by the City on November 23, 1934, but never executed by this appellant. One of the fundamental bases of the decree was the alleged attempt of this appellant to control and regulate, by means of said contract, the rates of the City and of appellee, which the District Court held to be in violation of the 10th Amendment.

II

During the pendency of this appeal, this appellant and said City conducted negotiations (more fully set forth in the memorandum in support of this motion hereto attached and by this reference thereto made a part hereof) which culminated in an understanding between this appellant and the city that, if and when said decree is appropriately modified, a new contract (a copy of which is hereto attached marked "Exhibit 1" and by reference thereto made a part hereof) will be executed. The reasons for the intention and desire to abandon the old proposed contract and execute the new contract are more fully set forth in said attached

memorandum and in a letter attached hereto (marked "Exhibit 2" and by this reference thereto made a part hereof).

III

As appears from the attached memorandum the new contract differs in significant respects from the old contract. It eliminates substantially all the provisions held invalid by the District Court, and particularly, all those provisions relating to or making possible any control or regulation of rates by the United States.

IV

This appellant submits that since this case has become moot in certain important respects it should, on the basis of authorities cited in the attached memorandum, be remanded to the District Court with directions to that Court to modify its decree to permit the parties to enter into a new contract in the form of Exhibit 1, with leave to appellants to file amended answers setting forth that fact, so that, upon the filing of such answers, and of such amended pleadings as appellee may thereafter file, prompt trial may be had of the issues raised by such pleadings.

V

This appellant desires and intends upon such a trial to introduce evidence proving that he intends never to execute the old proposed contract and that, in determining to execute the new contract, if permitted so to do, he considered solely whether the proposed loan and grant and said new contract complied in all respects with the provisions of Title II of

the National Industrial Recovery Act and the pertinent Executive Orders of the President of the United States, and more particularly gave no consideration to the following:

(1) The rates which might be charged by the city.

(2) The rates of the appellee.

(3) Whether lower rates for power are desirable.

(4) Whether it is desirable that the city should own and operate its own plant.

VI

This appellant offers to stipulate, as a condition of the granting of this motion, to expedite all proceedings in this cause and that the injunction decree shall, except for the execution of said new contract, remain in effect pendente lite.

Wherefore, upon the basis of the facts set forth and referred to in this motion and in the attached memorandum and the authorities referred to therein, this appellant respectfully prays that this cause be remanded to the District Court with directions as herein above set forth.

James W. Morris,
Assistant Attorney General.

Alexander Holtzoff,
Special Assistant to the Attorney General.

John W. Scott,
Special Assistant to the Attorney General.

Jerome N. Frank,
Counsel for the Federal Emergency Administrator of Public Works.

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MEMORANDUM IN SUPPORT OF MOTION TO REMAND

I. The District Court, relying in considerable part upon provisions in the contract executed by the city in November 1934, and letters and telegrams from the Federal Emergency Administration of Public Works (hereinafter for convenience called "P. W. A."), found that the United States was unlawfully seeking to control the rates to be charged by the city for the services and facilities to be afforded by its proposed water and electric system, and thereby to control and bring about a reduction of the rates of appellee, in violation of the Tenth Amendment, and also that, on the basis of such fact appellee had a standing to bring a suit asserting the unconstitutionality of Title II of the National Industrial Recovery Act, despite *Frothingham* v. *Mellon*, 262 U. S., 447.

As a result of decisions by several Federal courts, appellant, the Federal Emergency Administrator of Public Works (hereinafter for convenience referred to as the "Administrator"), came to the conclusion in recent months that it was desirable that the form of contract employed by P. W. A. in making contracts with municipalities for the financing of power projects should be revised in certain fundamental respects; such revision included the elimination of all provisions relating to the rates of such municipalities.

In particular, the proposed contract with the appellant, City of Coeur d'Alene (executed in November 1934, by the city but never executed on behalf of the United States), contained provisions, especially with respect to rates, which, upon reflection, seemed of doubtful validity. Indeed the Administrator has concluded that (particularly in view of the fact that the bonds of the city to be acquired by the United States are general obligation bonds and not revenue bonds) it was a mistake ever to have inserted in the proposed old contract any provisions whatsoever with respect to the rates to be charged by the city and that the sending of the letters and telegrams above referred to, was also an error.

Representatives of the Administrator and of the City for some time in recent months (while this case was on appeal) have corresponded and conferred because of the Administrator's desire that a new contract should be executed between the city and the United States from which there would be eliminated all the provisions relating to rates and also certain other important provisions.

The following appears from the letter written by Administrator to the City, Exhibit 2 (83 et seq.):

When the Administrator authorized the old proposed contract to be sent to the City and when certain letters and telegrams relied upon by the District Court were sent out, the Administrator did not have called to his attention by his subordinates, and therefore did not have in mind, the fact that the

City's bonds were general obligation bonds payable out of taxes. In a case where P. W. A. makes a loan to a city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project financed by the proceeds of such bonds. Under Title II of the National Industrial Recovery Act, the Administrator can make no loans which are not reasonably secured. Consequently, if the sole security consists of such revenues, the Administrator is obligated, in deciding whether the loan should be made, to consider the prospective earnings of the project and it therefore is necessary to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates to be charged by the City's competitor, because competitive rates may affect the earning power of the project and therefore the security of the loan. But where the loan is to be evidenced by general obligation bonds of the city, P. W. A., in determining the security of the loan, needs to consider merely the financial condition of the city generally, and usually [1] has ignored the revenues of the project and therefore has ignored the rates of the city and its competitors. In the case of the proposed old contract with the city of Coeur d'Alene, as above noted, the Administrator's attention was not directed to the fact that the bonds were general obligation bonds and he therefore overlooked that fact. He is occupied with a multitude of duties daily and occasional errors are therefore

[1] Exceptional instances are referred to in the Administrator's letter.

unavoidable.[2] Because of the foregoing, an error was made in including in that proposed contract with the city of Coeur d'Alene any provisions with respect to the rates of the city; and, for like reasons, he approved, without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of his subordinates with respect to the rates and services of appellee. He reached the conclusion several months ago that that attitude was entirely unjustified and has completely repudiated and abandoned it. He reached that conclusion when his attention was first again directed to the proposed old contract and those letters and telegrams by reading for the first time,

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[2] Some idea of the multitude of the Administrator's duties in connection with PWA may be inferred from the following statement made by Judge Parker in his opinion in the case of Greenwood County et al., v. Duke Power Company et al., (not yet reported, but printed, pages 11 et seq. of the Appendix submitted herewith):

> "The national character of the program here involved is shown, however, by the fact that projects of various kinds have been commenced in 3,040 of the 3,070 counties of the country; and the magnitude of the undertaking clearly appears from the report of the Administrator to the Senate, of March 22, 1934. See Senate Document No. 167, 73rd Congress, 2nd Session."

In addition to his duties as Federal Emergency Administrator of Public Works, Appellant Harold L. Ickes has multifarious duties to perform as Secretary of the Interior of the United States, as Administrator for the Oil Administration, as Chairman of the National Resources Board and in his several other official capacities.

when the case was on appeal, the opinion of the District Court in this case.[3]

He then concluded that, unless a new contract could be made which could be justified without any regard to such considerations as the rates for service of the city or appellee, he would be obliged to rescind the allotment on which the old contract was based—in which case there would be no contract whatsoever.[4] Upon reconsidering the project on that basis—and considering *solely* whether (a) the project would be a proper part of a comprehensive program of Public Works, (b) the general obligation bonds of the city would be reasonably secure, and (c) whether the project would help adequately to increase employment, and (d) other factors required by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President—he approved the making of a new contract in the form of Exhibit 1.

Accordingly he has—and has so advised the city—no intention of ever executing the old contract or any contract containing those terms of that contract not also contained in the new. His position is as follows: He has advised the city that (a) he has waived irrev-

[3] In his letter (Exhibit 2) the Administrator states that he regrets that he did not read that opinion sooner, but explains that his multitude of duties makes it impossible for him to keep constantly and closely in touch with the very considerable number of cases in which, as Administrator, he is involved.

[4] The allotment is simply an authorization to make a loan and grant. As the old proposed contract was never executed on behalf of the United States, there has never been any contract between the United States and the city.

ocably all those provisions of the old contract not set forth in the new contract, and (b) has completely abandoned and regrets that he ever expressed (1) any intention to have any control of any kind of the rates of the city or (2) any interest in appellee's or the city's rates or service. (See Exhibit 2 page 83 et seq.)

2. Because of the sweeping character of the injunction order entered by the District Court the city is unwilling to enter into a new contract, subject to the injunction, and not to become effective unless and until the injunction decree is appropriately modified; the city fears that the execution of a contract, even if it contained such a qualification, might be said to be in violation of the decree.

The effect of abandoning the old proposed contract and executing the new contract (subject to the decree) would be the same as if the parties had agreed to eliminate from the old proposed contract certain important provisions which the trial court found objectionable, and for that reason the Administrator was of the opinion that a new contract (properly worded so as to be subject to the injunction decree and not to become effective until that decree was appropriately modified) would not be in violation of the decree. The city, however, took the position that it would agree to execute a new contract, only if and when the decree has been appropriately modified.

The consequence is that, subject only to the injunction decree being thus modified, appellants are now ready to execute the new contract.

Because of the city's attitude, the Administrator has concluded that the wisest course is to file his

motion asking this court to remand this case with directions to the District Court to vacate and modify its decree to allow (a) the parties to enter into a new contract in the form of Exhibit 1; (b) with leave to appellants thereafter to file amended answers setting forth that fact and also the fact that, in determining to execute the new contract and in executing it the Administrator considered solely whether the proposed loan and grant and said new contract complied in all respects with the provisions of Title II of the National Industrial Recovery Act and the pertinent executive orders of the President of the United States and more particularly gave no consideration to the following: (1) the rates which might be charged by the City (since the bonds are general obligation bonds of the city); (2) the rates of the plaintiff; (3) whether lower rates for power are desirable; (4) whether it is desirable that the city should own and operate its own plant; and (d) that upon the filing of such answer and of such amended pleadings as appellee might file, there be a prompt trial of the issues raised by such pleadings.

3. The important differences between the old contract and the new are set forth in detail in the Appendix hereto. Perhaps the most important of those differences is the following: The old proposed contract provided that the United States should be under no obligation to pay for any of the bonds or to make any grant:

> Unless and until *the Borrower shall adopt a rate and bond ordinance satisfactory to the*

Administrator in form, sufficiency, and substance. Such ordinance shall, among other things, provide that:

(1) No donations, taxes, depreciation charges, or any other items of expense, except normal operating expenses and maintenance, together with water, lighting, and power extensions, shall be charged against the revenues of the Project;

(2) All municipally used water and electrical energy shall be paid for at current selling rate schedules, except water used in fighting fire, and a reasonable rate shall be paid for hydrant rental, all such payments to be made, as the service accrues, from the general funds of the Borrower into the funds of the Borrower's water and electric departments.

The proposed new contract, on the other hand, expressly provides that "*The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the Project.*" In this connection it will be noted that the new contract also expressly provides: "This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. *There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.*" [5]

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[5] See the comments on like provisions in the Greenwood County case, a copy of which is printed in pages 11 et seq. of the Appendix filed herewith.

If the injunction order is appropriately modified, the new contract, which will at once be executed, will entirely remove from this case those bases for the decree of the lower court with respect to the alleged attempted regulation by the United States of the rates of the city and the rates of appellee. As that alleged attempted regulation vitally affects not only the alleged invalidity of the old contract with respect to state law, but also assertions that the old contract violates the Federal statute and the constitution of the United States and gives the appellee a right to an injunction, it is plain that the intention to execute the new contract constitutes a most important and material alteration of the facts which were before the District Court prior to the entry of its decree. Because of the changes which will be made in the contract (and in the light of the limited considerations affecting the determination of the Administrator to execute the new contract, if permitted so to do), it will become clear upon a new trial that the correspondence and other data in the record bearing upon an alleged regulation of rates will become irrelevant and immaterial if they ever were material.

4. This Court is an appellate court, and, therefore, the Administrator cannot ask it to consider the new contract, and the facts set forth in Exhibit "2" as to the Administrator's intention, as evidence supplementing the record on appeal in arriving at a final decision of this case, for, obviously, this Court cannot consider those altered facts as part of the evidence.

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Title 28, Section 863 of the United States Code expressly provides that upon the appeal of any cause in equity "no new evidence shall be received in the Circuit Court of Appeals, except in admiralty and prize causes." See *Russell* v. *Southard*, 12 Howard 139, 158, 159; *Chisholm-Ryder Co.* v. *Buck*, 65 Fed. (2d) 735, 737[6] (C. C. A. Fourth). The appropriate procedure, we submit (as shown by the authorities

[6] In the case of *Greenwood County* v. *Duke Power Co., et al.*, (involving a motion to remand (similar to the present motion) in a case involving a P. W. A. contract) the following remarks (not reported) were made by the Court of Appeals for the Fourth Circuit (the very court which had previously decided *Chisholm-Ryder* v. *Buck, supra*) in the course of its ruling that the case should be remanded: "Parker, J.: Gentlemen, we have given this matter very careful consideration. You raise here one of the most important constitutional questions now before the courts of the country, and it is important, I think, that when this question goes to the Supreme Court, as it will go to the Supreme Court, that there be no controversy about what the record means; what it does not mean; what is proper to go before it, and what is not proper. There is another thing: One of the ablest District Judges in the United States has passed on this case in the court below. The appellate courts are entitled to have the benefit of his judgment on the record and on any change in the record—not only entitled to have his judgment; we want his judgment. And the Supreme Court will want the case passed on in its final form by both courts below. There is a third consideration: *We are a court of erros and appeals, and we have no right to pass upon the matter as a court of original jurisdiction.* Now a change has been made in this record. How material it is, how immaterial it is, probably will not appear on the argument. Certainly a change has been made. Counsel for the Government, Department of Justice, Commissioner of Public Works, say it is an important change. We feel that the record as it is affected by this change ought to be passed on by the District Court before we pass on it." [Italics supplied.]

hereinafter cited) is to remand the case to the trial court.

5. The facts of the case before the trial court no longer exist. A controversy still exists, but it is not the same controversy as existed when the decree was entered. If this court were to pass on the case as it then existed, it would be deciding an unreal non-existent controversy—a practice which the federal courts in particular have consistently refused to follow, especially when the constitutionality of a statute is involved.

In *Ashwander* v. *Tennessee Valley Authority* (decided February 18, 1936) the Supreme Court said:

> *The judicial power does not extend to the determination of abstract questions. Muskrat* v. *United States*, 219 U. S. 346, 361; *Liberty Warehouse Company* v. *Grannis*, 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 289; *Nashville, Chattanooga & St. Louis Rwy. Co.* v. *Wallace*, 288 U. S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the State. *New Jersey* v. *Sargent*, 269 U. S. 328. For the same reason, the State of New York, in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical

> water power developments in the indefinite future. *New York* v. *Illinois,* 274 U. S. 488. At the last term the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determinations." *United States* v. *West Virginia,* 295 U. S. 463, 474. *Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. Arizona v. California* 283 U. S. 423, 462. [Italics supplied.]

In *Cincinnati* v. *Vester,* 281 U. S. 439, 448, the Court said:

> It is an established principle governing the exercise of the jurisdiction of this Court, that it *will not decide important constitutional questions unnecessarily* or hypothetically. *Liverpool, New York & Philadelphia Steamship Company* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175, 191, 193; *United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407. [Italics supplied.]

There is involved in the present case not only a question of the constitutionality of a statute, but also the closely related question of the right of the appellee to raise the question of the constitutionality of expenditures under a federal statute, in the light of *Frothingham* v. *Mellon,* 262 U. S. 447.

In *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415, the Court said:

> It (the Tennessee Supreme Court) held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not "any more" consider "whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions" than it "could consider changed mental attitudes to determine the constitutionality and enforceability of a statute." A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. *A statute valid when enacted may become invalid by change in the conditions to which it is applied.* (Citing, inter alia, *Kansas City S. R. Co.* v. *Anderson,* 233 U. S. 325; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Abie State Bank* v. *Bryan,* 282 U. S. 765, 722; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 547; *Perrin* v. *United States,* 232 U. S. 478, 487.)

It is doubtless for that reason that the Supreme Court has several times refused to pass upon the constitutionality of a statute in the absence of findings of facts based upon adequate evidence. In *Hammond* v. *Shappi Bus Line,* 275 U. S. 164, the

city had enacted an ordinance excluding an interstate bus line from its streets. On an appeal from an interlocutory decree denying a preliminary injunction against the city, the Supreme Court remanded the case for proceedings on final hearing and the taking of evidence which would result in findings of fact bearing upon the constitutionality of the ordinance. The Court said (page 170): "The general principles governing the right of motor vehicles to use the highways in interstate commerce (citing cases) have been settled by these recent decisions. But the facts here alleged may, if established, require the application of those principles to conditions differing materially from any heretofore passed upon by this court." The court then went on to point out a large number of questions of fact (including the question of whether the city streets were congested and the date of the establishment of the plaintiff's lines) which might have an important bearing on the constitutionality of the ordinance.

The court then said (pp. 171, 172):

> These questions have not, so far as appears, been considered by either of the lower courts. The *facts* essential to their determination have *not been found* by either court. *And the evidence in the record is not of such a character that findings could now be made with confidence.* * * * *Before any of the questions suggested, which are both novel and of far-reaching importance, are passed upon by this court, the facts essential to their decision should be definitely*

found by the lower courts upon adequate evidence.[7]

In *Borden's Farm Products Company* v. *Baldwin*, 293 U. S. 194, a bill, to enjoin the enforcement of a state statute on the ground of its alleged unconstitutionality, was dismissed on a motion equivalent to a demurrer. On appeal the Supreme Court declined to pass on the merits of the suit and reversed the decree and remanded the cause for the taking of testimony and the making of findings of fact bearing on constitutionality. The Chief Justice made the following observations on this point (pp. 211–213):

> "For the present purpose, it is sufficient to say that these arguments are addressed to particular trade conditions in the city of New York, which largely lie outside the range of judicial notice. * * * But, the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but, if so read, it may be regarded as sufficient, the decision of this

[7] In *Hammond* v. *Farina Bus Line and Transportation Co.*, 275 U. S. 173, a similar suit, a like motion for a preliminary injunction was made, but, by agreement of the parties to the suit, *the cause was submitted to the District Court as upon final hearing* and the bill was dismissed. The Supreme Court refused to pass upon the question of the constitutionality of the statute and remanded the case for the taking of evidence upon final hearing.

appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court * * *.

"But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of Governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support. * * *

The importance of adequate findings of fact in relation to controlling economic conditions was emphasized in *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543. Before deciding the question we found that it was "material to know the condition of Washington at different dates in the past" and that "obviously the facts should be accurately ascertained and carefully weighed." We said that this could be done more conveniently in the Supreme Court of the District than here, and for this reason the judgment below, dismissing the bill, was reversed, and the cause was remanded

for appropriate ascertainment of the facts (p. 549).

Another illustration is found in *Hammond* v. *Schappi Bus Line,* supra, involving the validity of a city ordinance regulating motor traffic in designated parts of the city's streets. The lower courts had not made findings upon crucial questions of fact * * *. We held that before the questions of constitutional law, both novel and of far-reaching importance, were passed upon by this Court, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence" (pp. 171, 172). Concluding that the case had not been appropriately prepared for final disposition, we remanded it for proceedings in the District Court, "*with liberty, among other things, to allow amendment of the pleadings.*" This procedure was in accordance with well-established precedents. * * *

As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½. [Italics added.]

If the case at bar there were no findings of fact, then it would be improper, in the light of the decisions

of the Supreme Court and Equity Rule No. 70½[8], for this Court to pass upon the case. The District Court did make findings of fact. But, *as the facts have materially changed since the decree was entered by the District Court, the situation, for practical purposes, so far as the presently existing facts are concerned, is precisely the same as if no findings of fact had been made by the District Court. Findings as to facts no longer existing are the equivalent of no findings whatsoever as to existing facts. It cannot be said, therefore, that the "facts essential to the decision have been found upon adequate evidence."*

In the case at bar, questions of novel and far-reaching importance are before the Court, namely, whether the Federal Statute is constitutional, whether if it is constitutional, the statute has been violated, and whether (even if the statute is unconstitutional or has been violated) the appellee has a standing to sue despite *Frothingham* v. *Mellon*, 262 U. S. 447. The determination of all of these questions must turn on the facts. The statute may be constitutional on one set of facts, but not on another; the statute may appear to have been violated on one set of facts, and not on

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[8] As to the necessity for findings under Equity Rule No. 70½, see *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U. S. 67; *Southwestern Bell Telephone Co.* v. *City of San Antonio* (C. C. A. 5th Circuit), 75 F. (2d) 880, certiorari denied 295 U. S. 754; *Sparks* v. *Mellwood Dairy* (C. C. A. 6th Circuit), 74 F. (2d) 695; *Louisville & N. R. Co.* v. *United States* (D. C. Ill.), 10 F. Supp. 185; *Siano* v. *Helvering* (C. C. A. 3rd Circuit) 79 F. (2d) 444. Compare *Railroad Commission of Wisconsin* v. *Maxey*, 281 U. S. 82, and *Nashville C. & St. L. R. Co.* v. *Walters, 294 U. S. 405.*

another; and appellee's right to sue may exist on one set of facts and not on another.

In *Lawrence* v. *St. Louis San Francisco Railway Co.*, 274 U. S. 588, 596, the Court, in holding that an injunction should not be issued without giving the grounds therefor, said that that was particularly true in the case of an injunction against the enforcement of a state law, "For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown." So, in the present case, the respect due to the Congress and to the Executive demands that the need for nullifying the action of either should be persuasively shown, and the Congressional or Executive action should not be nullified unless there is a finding of presently existing facts justifying such nullification.[9]

The presently existing relevant facts affecting constitutionality and related questions are not now before this court and can only be brought before this court by the introduction of further evidence in the trial court, and by findings of fact with respect thereto.

As stated by the Chief Justice in the case of *Ashwander* v. *Tennessee Valley Authority*, *supra*,

> We agree with the Circuit Court of Appeals that the question to be determined is limited

[9] That rules applicable to cases involving the validity of state legislation are equally applicable to cases involving the validity of federal statutes, see *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

> to the validity of the contract of January 4, 1934. *The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete constitution, an actual or threatened interference with the right of the persons complaining.* * * *

Similarly, Judge Sibley in his concurring opinion in the same case in the Circuit Court of Appeals (C. C. A. 5th) 78 Fed. (2d) 578, 583, stated:

> This case is not to be decided by the purposes and plans of the Board, but by the validity of what is about to be done under the attached contracts.

With the provisions of the old proposed contract as to rates completely eliminated, the Administrator is completely without means to affect the rates of the plaintiff even if he had the desire so to do. His intentions, motives, or desires, regardless of what they might be, could not hurt the plaintiff because he will be without the means of putting them into action. It is "action of a definite and concrete character" and not wishes or desires of which appellee may be heard to complain. With the means of injury eliminated, letters and telegrams indicating an alleged prior improper policy will no longer be material, if they ever were material.

6. It will appear from the Appendix to this memorandum that the proposed new contract also eliminates many other important provisions of the old

contract, relating to the construction of the project, of which appellee complains. The elimination of those provisions was due in considerable part to the opinion of the Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett,* 78 Fed. 911, in which that court held that a similar P. W. A. contract violated the laws of the State of Missouri. (See pages 1 et seq. of Appendix filed herewith explaining important differences between the old proposed contract and the new proposed contract; see also opinion of the Circuit Court of Appeals for the Fourth Circuit in the Greenwood County case, printed in the Appendix, pages 11 et seq.)

7. The Administrator believes that the facts set forth in his motion and this memorandum make this case moot as to some of the most important questions involved, and therefore justify a remand so as to permit the execution of the new contract and the introduction of evidence as to his changed intentions in authorizing its execution. He believes that, out of respect to this Court, he should call its attention to the changed circumstances and that it *would be unfair to the Judiciary, to the Congress and to the Executive Branch of the Government to have the constitutionality of the Federal Statute determined on the basis of administrative action* (*now no longer existent*) *due to inadvertent errors which have been rectified.*

8. In several suits substantially similar to the case at bar (brought in Federal courts by public-utility companies to enjoin municipalities and the Public Works Administration from carrying out contracts—

substantially similar to the old proposed contract in this case—for loans and grants for the construction of electric power plants) motions to remand to the trial court were made and granted which were based on substantially the same facts as the present motion. In each case, while on appeal, a contract between the municipality and this appellant, which was in existence when the lower court had entered its decree, was abrogated and a new contract (substantially similar to the new contract, Exhibit 1) was executed.

There is printed in the Appendix submitted herewith (pages 61 to 63) the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *Greenwood County, et al.* v. *Duke Power Co., et al.*, decided February 22, 1936. In that case there had been a trial with reference to a contract between the County of Greenwood and P. W. A., substantially similar to the old proposed contract between this appellant and P. W. A.

A decree had been entered by the trial court in favor of the plaintiff power companies, enjoining the county and P. W. A. from proceeding with the performance of the contract. While the case was on appeal from that decree, the county and P. W. A. entered into a new contract substantially similar to the new proposed contract between this appellant and P. W. A., excepting that said new contract is less onerous in the terms imposed upon the city of Coeur D'Alene than those imposed on the county by the new contract between the County of Greenwood and P. W. A., due to the fact that the P. W. A.

is to purchase *general obligation bonds* of the city, whereas under its contract with Greenwood County, P. W. A. agreed to purchase *revenue bonds* payable as to principal and interest solely out of the earnings of the county's plant. Because of the difference between that contract and the proposed new contract in the present case, the Administrator, in making the new contract with the County of Greenwood, had to consider the prospective earnings of the county's plant and therefore had to take into account its prospective rates. On a new trial in the present case we shall offer the Administrator's testimony to show that in authorizing the proposed new contract between the city and P. W. A. (since the bonds are general obligation bonds of the city) the Administrator has not taken into account the question of rates, and that the new contract with the city therefore expressly provides that, "*The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the project*", whereas the new contract with the County of Greenwood provided:

> The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such Bonds.

Although a decree based upon a trial on evidence had been entered by the trial court in the Greenwood County case and the term at which that decree was entered had already expired when the new contract was executed, the Court of Appeals for the Fourth Circuit, when that new contract was called to its attention, granted a motion to remand the case. A copy of the order of remand is printed in the appendix submitted herewith.

A second or supplemental trial then took place and a new appeal was taken. The attached opinion of the Court of Appeals in that case shows that that court on the second appeal again held that its motion to remand was proper and that new evidence relating to the policy and intentions of the Administrator both in making the old contract and the new contract was admissable. The Court said:

> On November 30, 1935, *shortly before the appeal* in No. 3971 *was to be heard in this court, a contract was executed between the Administrator and the county abrogating the contract of December 8, 1934, and prescribing new terms and conditions for the making of the loan and grant, but not changing the amount of either of them. This contract eliminated those provisions of the old contract which had been held ultra vires the powers of a municipal corporation in Arkansas-Missouri Power Co.* v. *City of Kennett, Mo. (C. C. A. 8th) 78 Fed. (2d) 911, and also the provisions of the old contract which had been held by the court below to give the Administrator control over the rates*

to be charged by the county. A new provision designed to eliminate any contention that the loan and grant were made upon conditions not embodied in the contract, was inserted in the following language: "13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the applicant and the government or any of its agencies in any way relating to said project." Under the terms of this contract the Administrator retained no control over the work to be done; but it was specified that certain conditions as to wages, hours of work, employment of convict labor, collective bargaining, etc., should be observed by the county and by contractors and subcontractors on the project.

Upon the contract of November 30, 1935 being called to our attention, *we immediately remanded the case to the court below to the end that that court might reconsider its decision in the light of the contract and take such further action as might be appropriate. This was done because in our opinion there was probability that the case had been rendered moot, at least as to some of the questions involved, by the execution of the new contract; and we thought that, in view of the changed situation, the lower court should be revested with jurisdiction of the entire cause, with power to enter such decree as might be deemed appropriate.*

> *That the lower court may be thus revested with jurisdiction of the cause after the expiration of the term at which the decree appealed from was entered, in order that it* may give consideration to some phase of the case which it has overlooked or *may take into consideration matters which have occurred since the taking of the appeal, is too clear for discussion.* See *U. S.* v. *Anchor Coal Co.*, 279 U. S. 812; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171, 172; *Wyant* v. *Caldwell*, (C. C. A. 4th) 67 Fed. (2d) 372; *Finefrock* v. *Kenova Mine Car Co.*, (C. C. A. 4th) 22 Fed. (2d) 627.

On the basis of the new contract and the sworn testimony (at the second or supplemental trial) of the Administrator (a Cabinet Officer of the United States) the Court of Appeals held that the contract was valid, and that the P. W. A. statute was constitutional and had been fully complied with.

There are printed in pages 64 to 95 and 96 to 124 of the Appendix submitted herewith copies of (1) the original contract between P. W. A. and Greenwood County, which this court will see was substantially like the old contract between P. W. A. and the city; and (2) the new contract between P. W. A. and Greenwood County, which this court will see is substantially the same (except as above noted as to rates) as the new contract between P. W. A. and the City, said new contract with Greenwood County being that which was held valid by the Court of Appeals for the Fourth Circuit.

7. In four cases in the United States Court of Appeals for the District of Columbia pending on appeal from final decrees in favor of this appellant, that Court, on similar motions, remanded the cases to the trial court. A copy of the order of remand dated December 19, 1935 in one of such cases (similar orders being entered in all the cases) is set forth in pages 59 to 63 of the Appendix, together with a copy of the opinion of the court in that case.

9. It has been frequently held that where a case, while on appeal, has become partly or wholly moot, because of intervening circumstances, the appellate court will take appropriate steps to meet the changed situation. Where the decree or judgment below was for the defendant and the case has become wholly moot, the appeal will be dismissed. Where the decree below was for the plaintiff, the case will be remanded with directions to vacate the decree and dismiss the suit, *United States* v. *Anchor Coal Co.*, 279 U. S. 812. Where the case has become partly moot because of altered circumstances, the appellate court will remand with directions to vacate the decree and for the taking of further testimony, irrespective of the fact that the term at which the decree was rendered has expired.

In *Atherton Mills* v. *Johnston*, 259 U. S. 13, the plaintiffs, father and son, filed a bill against the Atherton Mills alleging that the son was a minor and was about to be discharged by the defendant pursuant to the Child Labor Tax Act. The bill prayed for an injunction against the discharge,

claiming the statute to be unconstitutional. The District Court granted an injunction. During the pendency of the appeal, the son became of age. The Supreme Court held that the case was moot and reversed the decree with directions to dismiss the bill.

In *Patterson* v. *Alabama*, 294 U. S. 600, the Court said:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, *the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.* We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21; *Dorchy* v. *Kansas*, 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n*, 273 U. S. 126, 131.
>
> Applying that principle of decision, we vacate the judgment and remand the case to the state court for further proceedings. [Italics supplied.]

See also *Board of Public Utility Commissioners* v. *Compania Generalia de Tobacos de Filipinos*, 249 U. S. 425; *Raferty* v. *Smith, Bell & Co.*, 275 U. S. 226; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Paducah* v. *Paducah Water Co.*, 258 Fed. 20 (C. C. A. 8th); *Mills* v. *Green*, 159 U. S. 651.

Since the new contract is very substantially different from the old contract, this is not a case where parties defendant have abrogated an old contract with the intention of having a case involving that contract dismissed, and with either the secret or overt intention of thereafter entering into a new contract containing the same or substantially similar terms.

Accordingly, the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290,[10] is not in point. In that case, suit had been brought by the United States under the Sherman Act against defendant railroad corporations which had entered into a contract alleged to be in restraint of trade. The contract showed that the parties were using an Association merely as a means of carrying out the alleged restraint of trade. The bill filed by the United States (as appears from the opinion of the Court, 166 U. S., at 308) asked not only for the dissolution of that Association but that the defendant railroads should be restrained from continuing in any like Association and should be enjoined from further combining. As the Supreme Court stated in its opinion (p. 308) the mere dissolution of the old Association was not the real object of this litigation.

[10] Cited by power companies in unsuccessful efforts to prevent remands in other like cases.

Judgment was entered in the trial court for the defendants. They moved to dismiss the appeal on the ground that, while the case was pending on appeal, the old Association had been dissolved. As the Supreme Court pointed out, the defendants, in bringing to the notice of the Supreme Court the fact of the dissolution of the old Association "took pains to show that such dissolution had no connection or relation whatsoever with the pendency of the suit, and that the Association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purposes not to enter into a similar one in the immediate future. On the contrary, by their answers *the defendants claim that the agreement is a perfectly proper, legitimate, and salutary one, and that it or one like it is necessary* to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the Association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further and enjoin defendants from entering into or acting under any *similar agreement* in the near future."

Moreover, as pointed out by the Supreme Court, the Government, in opposition to the motion to dismiss the appeal, showed that at the very same meeting

at which the Association was dissolved, a resolution was adopted that a committee be appointed "to draw up a *new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement* and to make a report to all lines in the Trans-Missouri Association" in a meeting thereafter to be called. Pursuant to that resolution the defendants had *entered into a new agreement providing for a new Association to perform the same functions as the dissolved Association* (see 166 U. S. at 305).

These facts were referred to by the Supreme Court in its opinion (pp. 308, 309) as showing that the dissolution of the old Association could not affect the merits of the litigation in any possible way, inasmuch as there was a *mere change in form* and not in substance.

But in the case at bar, as above stated, there is far more than a mere change in form; the new contract is very substantially different in substance from the old.[11] In other words, this appellant, as distinguished from the defendants in the Trans-Missouri case, is not asserting that, although the contract involved in the suit has been abandoned, he intends to enter into

[11] Also, as above noted, and as our motion states, appellant desires to prove that, in determining that the new contract should be made, the Administrator considered only whether the proposed loan and grant and the new contract complied in all respects with the provisions of the federal statute and pertinent orders of the President, and that he gave no consideration to the rates attempted to be charged by the city, or to whether lower power rates were desirable, or whether it was desirable for the city to own and operate its own power plant.

a new contract virtually identical with the old contract, but, on the contrary, has advised this Court that the old contract has been abandoned and that the new contract—which he desires to execute and submit to the trial court—is in most important respects entirely different from the old contract, and that the Administrator's purposes and intention in determining to enter into that new contract are substantially different from those which, on the allegations of the appellee's bill, actuated him when authorizing the old contract to be sent to the city. Moreover, the appellant is not seeking to evade a determination of the facts by the trial court, but is urging that the trial court should hear evidence for the purpose of determining the existing facts.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498,[12] there was before the court an order of the Interstate Commerce Commission, which by its terms was to run for a period of a little more than two years, requiring certain railroads to cease and desist from granting a certain shipper an alleged undue preference. While the case was on appeal it was contended that the order of the Commission had expired by lapse of time, that the case had therefore become moot, and that consequently the appeal should be dismissed. The court pointed out that "*orders of the Interstate Commerce Commission are usually continuing* (*as are manifestly those in the case at bar*) and their consideration ought

[12] Cited by power companies in unsuccessful efforts to prevent remands in other like cases.

not to be, as they might be, defeated, by *short term orders, capable of repetition, yet evading review,* and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

Later decisions, however, show that where there is no such threat of repetition of the very act complained of, the court, because of changed circumstances, will remand a case which has become moot.

Thus in the later case of *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, suit was brought by certain cable companies to enjoin the Postmaster General from interfering with their control of properties taken from them by the Government during the war. The District Court dismissed the bills for want of equity. While the cases were pending in the Supreme Court the Government called attention to the fact that the cable lines in question had been turned back to the plaintiffs. The companies objected to the case being considered as moot, on the ground that there was fear that their properties might again be wrongfully taken and because the Government might in the future assert that the revenues for the period during which the Government had operated the properties belonged to the United States. The court rejected that argument, stating:

> By appeals the cases were brought here and were argued and submitted in March last. While they were under advisement the United States directed attention to the fact that by authority of the President all the

cable lines with which the two corporations were concerned and to which the bills related had been turned over to and had been accepted by the corporations, and the Government hence had no longer any interest in the controversy. As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants for the following reasons: First, it is said that as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken unless these cases now proceed to a decree condemning the original wrong; and, second, that although it is true that during the operation of the property while under the control of the Government all the revenues derived from it were separately kept and have been returned to the owners of the property—a result which financially is satisfactory to them—nevertheless, unless there is a decree in this case, the owners can feel no certitude that the revenues may not be claimed from them by the United States in the future.

But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason. In giving effect, however, to that conclusion, we are of opinion that the decrees below, which in sub-

> stance rejected the rights asserted by the complainants, ought not to be allowed to stand, but on the contrary, following the well established precedents (*United States* v. *Hamburg-American Co.*, 239 U. S. 466; *United States* v. *American-Asiatic S. S. Co.*, 242 U. S. 537), the decrees below should be reversed and the cases remanded to the lower court with directions to set aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs, because the controversy which they involve has become moot and is no longer therefore a subject appropriate for judicial action (p. 362).

In *United States* v. *Anchor Coal Co.*, 279 U. S. 812 (a much later decision than those in the Trans-Missouri and Southern Pacific Terminal cases), the District Court (25 F. (2d) 462) had enjoined the enforcement of an order of the Interstate Commerce Commission, directing carriers to cancel certain rate schedules. The Court reversed the decree below and remanded the cause with directions to dismiss the bill saying:

> These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the appeals would leave the injunction in force, at least apparently so, notwithstanding that the basis therefor has disappeared. Our action must, therefore, dispose of the cause, not merely of the appellate pro-

ceedings which brought it here. The practice now established by this Court under similar conditions and circumstances is to reverse the decree below and remand the cause with directions to dismiss the bill. The order will be, therefore, that the decree is reversed with directions to the District Court to dismiss the bill of complaint without costs, because the controversy involved has become moot and, therefore, is no longer a subject appropriate for judicial action. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 242 U. S. 468, 470; *Board of Public Utility Comm'rs* v. *Compania General de Tobacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Alejandrino* v. *Quezon*, 271 U. S. 528, 535; *Norwegian Co.* v. *Tariff Comm'n* 274 U. S. 106, 112.

In *Kunze* v. *Auditorium Co.*, 52 Fed. (2d) 444 (C. C. A. 8th), an order had been entered by the trial court granting a temporary injunction against city officials restraining them from interfering with the exhibition of a moving-picture film. On the argument it appeared that the picture had been exhibited for a short time while under the protection of the temporary injunction and that there was no intention on the part of the plaintiff to attempt to show the picture again. The Circuit Court of Appeals remanded the case with directions to vacate the order and dismiss the bill on the ground that the case had become moot.

In *Watts, Watts & Co.* v. *Unione Austriaca &c.*, 248 U. S. 9, at 21,[13] the court said:

> This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. And in determining what justice now requires, *the court must consider the changes in fact* and in law *which have supervened since the decree was entered below.* [Italics supplied.]

10. We anticipate, from arguments made by plaintiff power companies in other cases where similar motions to remand have been made by this appellant and granted, that appellee in this case will call attention to the case of *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547. When the Greenwood County case was remanded by the Court of Appeals, the District Judge Watkins, after the second trial, wrote an opinion in which he indicated that the order of remand was improper, citing *Realty Acceptance Corporation* v. *Montgomery* and related cases, and, on the second appeal that case and related cases were cited by the plaintiff power companies who, on the basis of those cases, vigorously asserted that the order of remand had been improperly made. But as will appear from the language above quoted from the opinion of the Court of Appeals for the Fourth Circuit in the Greenwood case, the court again determined that the order of remand was entirely proper.

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[13] This case is cited with approval in the recent case of *Patterson* v. *Alabama*, *supra*.

Plainly, it did do so because the cases cited by Judge Watkins and by the Plaintiffs in the Greenwood case are not at all in point, as appears from the following:

In *Realty Acceptance Corporation* v. *Montgomery*, *supra*, the District Court had entered a judgment in favor of the plaintiff. On appeal, the Circuit Court of Appeals entered an order of affirmance and dismissed the appeal. The defendant thereafter filed a petition in the Court of Appeals setting forth that at the trial the plaintiff had failed to disclose certain earnings which should have been taken into account in mitigation of damages; that these facts had been discovered after the appeal had been taken; that the mandate of the Court of Appeals should be stayed to afford the trial court opportunity to request the return of the record so that the judgment could be opened and a new trial granted on the issue of the *quantum* of damages. This petition was granted, and upon request of the District Court, the Court of Appeals made an order vacating its affirmance of the judgment and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, and, on the basis of the newly discovered evidence, set aside the judgment and granted a new trial. The plaintiff then appealed from that order and the Court of Appeals found that its previous order vacating the order of affirmance was in error and reinstated the order affirming the original order of the trial court. The United States Supreme Court affirmed this order on two grounds:

(1) Since the term at which the judgment in favor of the plaintiff had been entered by the trial court had expired, the Appellate Court did not have power to remand the case *solely* for the hearing of new evidence as to *facts which existed prior to the entry of the judgment* (citing *Roemer* v. *Simon*, 91 U. S. 149).

(2) There was what the Supreme Court called *"a further conclusive reason"*, viz, that the motion to remand the case was made after the Court of Appeals had dismissed the appeal. As to this point, the Supreme Court said:

> This action was final, ended the case in that court, and deprived it of all power to add to or alter the record as certified. Since there was no case pending power was wanting to make any order granting leave to the court below for any purpose. The attempt by remanding the record with leave to the court below to take action which would otherwise have been beyond its powers left the matter precisely as if no such order had been made.

As that was a "conclusive reason" for its decision, the balance of the opinion may be regarded as dictum, and certainly as amply justifying the statement that it is not to be considered as inconsistent with numerous other decisions of the Supreme Court cited by us.

But even assuming that this "conclusive reason" was not the sole basis for the court's decision, and restricting attention for the moment to the other reason given by the court, it is obvious that appellee has entirely misconstrued that decision. The basis of the motion for remand in that case was that, at

the trial in the trial court, "the respondent had failed to disclose certain earnings of which he had been in receipt, which should have been taken into account in mitigation of damages", and "that this fact had been discovered after appeal from the judgment." On that basis, the Court of Appeals was asked to remand, so that the judgment could be opened and a new trial be granted on the issue of quantum of damages (284 U. S. 548–549). In other words, the sole basis for the remand was to enable evidence to be introduced as to facts which existed prior to the entry of the judgment of the trial court. The Supreme Court stated that the applicable section of the Judicial Code does not warrant a reversal of a judgment or decree solely for that purpose. The Court did not indicate that an order of remand should not be made for the purpose of hearing evidence as to events occurring subsequently to the time of the entry of the trial court's judgment or decree. The court (284 U. S. 550–551) carefully pointed out that the Judicial Code authorizes a remand to the lower court with directions to open the judgment, and that in such a case the trial court may receive new evidence saying:

> The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modifi-

> cation or a reversal of a judgment where, in consequence of such action, such proceedings should be had.

In support of that statement the Court cited with approval *Kendall* v. *Ewert*, 259 U. S. 139. In that case the Court of Appeals remanded the case to the trial court for the purpose of taking evidence as to matters which occurred after the case was on appeal. This was approved by the Supreme Court, which based its decision largely upon such new evidence. It is clear, therefore, that in the *Realty Acceptance* case the Court certainly went no further, at most, than to hold that a case should not be remanded *solely* for the purpose of taking new evidence as to matters which had occurred prior to the entry of the decree.

The plaintiff power companies in the Greenwood case took the position that the *Realty Acceptance* case is to the effect that, in the absence of error by the trial court, an appellate court can never remand a case, after the expiration of the term at which the trial court entered its final judgment or decree, in such a way as to permit the taking of any evidence, whether as to old matters or new. It is clear that at most, the first ground of the decision in the *Realty Acceptance* case does not go that far: at most, it holds that such an order of remand cannot be made *solely* for the purpose of taking new evidence as to *matters which occurred prior to the entry of the judgment or decree* of the trial court, if the term at which that

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judgment or decree was entered, has expired. The decision in that case can be explained entirely upon the second "conclusive reason." But even if it be assumed that the true basis of that decision was the first reason given by the Supreme Court, it can clearly have no application to a case where the basis for remanding is the *occurrence of new matters after the entry of the judgment or decree of the trial court.* Otherwise, it would be impossible for an Appelate Court ever to remand a case with directions to vacate a judgment or a decree, after the term has expired, because of the occurrence of new events making the case moot in whole or in part. As the United States Supreme Court has frequently remanded cases under such circumstances, it is impossible to believe that the *Realty Acceptance* case was designed to prevent such action. It should be noted that such an order of remand was made in *Patterson* v. *Alabama*, 294 U. S. 600, decided after the decision of the *Realty Acceptance* case.

Moreover, in view of the second ground of the decision in the *Realty Acceptance* case, there is good reason to believe that the first ground of that decision was more or less in the nature of dictum and could not have been intended as a decision to the effect that, in the absence of error by the trial court, an appellate court can never remand a case for the taking of further evidence even as to matters which occurred prior to the entry of the decree of the trial court and prior to the expiration of the term at which it was entered. For such a ruling would

be squarely in the teeth of the long line of cases such as *Estho* v. *Lear*, 7 Pet. 130; *Chicago, M. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 179; *United States* v. *Rio Grande, etc., Co.*, 184 U. S. 416; *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. In those and related cases the Supreme Court has repeatedly held that it may remand a case and reverse the decree because the facts before it are not sufficient to enable it to do justice to the parties.

Thus in *United States* v. *Rio Grande Dam and Irrigation Company*, 184 U. S. 416, the Court said (424):

> In *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, one of the questions arising in the pleadings was whether the Illinois Central Railroad Company was entitled to maintain certain docks, piers, and wharves on the lake front at Chicago. The circuit court decided that question in favor of the railroad company. But this court was of opinion that the evidence in the record was not adequate for the determination of that question, and upon its own motion reversed the decree and remanded the cause with directions for further investigation, so as to enable the court to determine whether the structures in question extended into the lake beyond the point of practical navigability having reference to the manner in which commerce was conducted on the lake.

That the *Realty Acceptance* case cannot have been intended to overrule such cases is clearly demonstrated by the fact that in *Borden's Farm Products*

Company v. *Baldwin*, 293 U. S. 194—decided some two years ago after the *Realty Acceptance* case—the Supreme Court (293 U. S. 194, at 213) referred to and relied upon "well-established precedents", citing *Estho* v. *Lear; Chicago, M. & St. P. Ry. Co.* v. *Tompkins; United States* v. *Rio Grande, etc., Co.;* and *Lincoln Gas Co.* v. *Lincoln.*

The doctrine of these cases has been frequently applied by the Circuit Courts of Appeal.

In *Finefrock* v. *Kenova Mine Car Co.*, 22 F. (2d) 627 (C. C. A. 4th), after a trial on the merits, the District Court dismissed the bill, which alleged a breach of trust. The Circuit Court of Appeals for the Fourth Circuit found that the evidence did not support the allegations of the bill, but that it might show a fraudulent conveyance within the terms of a pertinent West Virginia statute. However, the bill "was not based upon the West Virginia statute, and it was not considered by the parties either in their pleadings or in the arguments at the bar." Accordingly, the Court of Appeals remanded the case to the District Court and said (p. 634):

> We think that the proper action on this branch of the case is to remand it without final decision to the District Court for further proceedings, in which, if the parties desire it, the pleadings may be amended, additional evidence may be taken, and the defendants may have full opportunity to present their defense. There is abundant authority for the proposition that the appellate court has power, without determining and disposing of a case, to

> remand it to the lower court for further proceedings, if the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the questions presented, with justice to all the parties concerned. *Coombs* v. *Hodge*, 21 How. 397, 16 L. Ed. 115; *Wiggins Ferry Co.* v. *Ohio & Miss. R. Co.*, 142 U. S. 396; 12 S. Ct. 188, 35 L. ed. 1055; *Jones* v. *Meehan*, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; *N. Y. Central & N. R. Co.* v. *Beaham*, 242 U. S. 148, 37 S. Ct. 43, 61 L. ed. 210; *U. S. v. Rio Grande Dam Co.*, 184 U. S. 416, 423, 22 S. Ct. 428, 46 L. ed. 619; *Rio Grande Dam & Irrigation Co.* v. *U. S.*, 215 U. S. 266, 275, 30 S. Ct. 97, 54 L. ed. 190; *U. S.* v. *Shelby Iron Co.*, 273 U. S. 571, 47 S. Ct. 515, 71 L. ed. 781.

In *Underwood* v. *Commissioner of Internal Revenue*, 56 F. (2d) 67 (C. C. A. 4th, 1932) the Court of Appeals for the Fourth Circuit remanded for rehearing a determination of the Board of Tax Appeals. The Court said (p. 73):

> In a number of instances, Circuit Court of Appeals have remanded cases for rehearing when it seemed necessary in order to do justice to the parties. It does not appear in these cases that new evidence was available; but in the instant case the evidence is known to exist and it would be an abuse of discretion to decline to receive it. * * * In addition, there is the well-established rule that an appellate court has the power, without determining and disposing of a case, to remand it to the lower court for further proceedings, if

the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the question presented with justice to all parties concerned. See *Finefrock* v. *Kenova Mine Car Co.* (C. C. A.) 22 F. (2d) 627, 634, and cases cited; also *Seufert Bros. Co.* v. *Lucas* (C. C. A.) 44 F. (2d) 528.

See also to the same effect:

Wyant v. *Caldwell,* 67 F. (2d) 374 (C. C. A. 4th 1933).

Peterlini et ux. v. *Memorial Hospital Association of Monongahela,* 232 Fed. 359 (C. C. A. 3d 1916).

Pfeil v. *Jamison,* 245 Fed. 119 (C. C. A. 3d 1917).

Columbus Gas & Fuel Co. v. *City of Columbus,* 55 F. (2d) 56 (C. C. A. 5th, 1931).

Delaware & Hudson Co. v. *Stankus,* 63 Fed. (2d) 887, cited by District Court Judge Watkins (and the plaintiffs) in the Greenwood case, related to a request for a remand, *solely* for the purpose of considering testimony as to *matters which were in existence prior to the entry of the decree* by the trial court; it therefore has no application to our motion for the reasons above stated.

Jensen v. *New York Life Insurance Co.,* 59 Fed. (2d) 957, cited by District Court Judge Watkins (and the plaintiffs) in the Greenwood case, was decided shortly after the *Realty Acceptance case* had been decided, and is out of line with the *Borden's Farm case* and the numerous other cases cited above: It was decided before the *Borden's Farm case* and before other cases cited by us (as to the propriety of

a remand where material events and changes have occurred after the decree of the trial court has been entered). It ignores the doctrine of *Estho* v. *Lear* and related cases which, as above noted, were reaffirmed in the *Borden's Farm case.* Moreover, the *Jensen case* is out of line with the recent decisions of the Court of Appeals for the District of Columbia and the Court of Appeals for the Fourth Circuit (relating to motions for remand virtually identical with those made in this case), courts which have had an opportunity to consider the true significance of the *Realty Acceptance case* in the light of the subsequent *Borden's Farm case.* It was decided before *Alabama* v. *Patterson,* 294 U. S. 600, 607.

In the *Greenwood County case,* as above noted, the Circuit Court of Appeals for the 4th Circuit has twice decided that such an order of remand as we seek in this case is entirely proper. It did so although fully aware of the *Realty Acceptance* case. This is indicated not only by the fact that that case was cited to the Court in the *Greenwood County* case by the plaintiffs in that case, but also by the following:

After that Court had decided the *Finefrock* case and the *Underwood* case, *supra,* there came before it, the case of *Chisholm-Ryder Co.* v. *Buck,* 65 F. (2d) 735. In that case, while an appeal, the plaintiff made a motion that the Court of Appeals should itself receive and consider as part of the record, certain evidence not presented to the trial court but constituting cumulative evidence. Instead of asking

the Court of Appeals to remand the case to consider such new evidence, a motion was made that the Appellate Court itself should consider that evidence. The Court of Appeals in denying that motion said:

> * * * *We are not required to decide whether this evidence might have been made available in some other way, but merely whether it should be received at this time in this Court.*

In discussing that question the Court of Appeals cited and discussed the *Realty Acceptance* case. It is therefore obvious that the Court had the *Realty Acceptance* case fully in mind when, but a short time thereafter, it decided the case of *Wyant* v. *Caldwell*, 67 Fed. (2d) 374. In that case the Court reasserted the doctrine of the *Finefrock* case, holding that the record on appeal from a decree confirming a report of a Special Master was insufficient as a basis for review and remanded the case for complete findings of fact, saying:

> It is impossible for us to pass upon the case in any adequate way on the record before us; and we shall accordingly remand it to the court below, with directions to find the facts fully as to the disputed matters, * * * and to reconsider carefully the allowance to the receiver for his service as well as the credits allowed for payments made to the manager and his relatives, and with power to make such modifications in the decree as may be proper.

The Supreme Court in the *Realty Acceptance* case pointed out that where there is a proper basis for remanding a case, then the judgment or decree

entered by the trial court is opened up and vacated, a new term begins, and the expiration of the term in which the earlier decree was entered is no bar to the taking of further testimony by the trial court, as to matters which occurred either before or after the expiration of the term at which the earlier decree was entered.

It is true that, if an order of remand is improperly made, it is legally void, and accordingly, no further testimony can be taken by the trial court if the term has expired. But in a case (such as the *Borden's Farm case* or *Patterson* v. *Alabama, supra,* for instance) where the appellate court properly and validly remands the cause, there can be no question that further evidence may be heard by the trial court. See *John Simmons Co.* v. *Grier Brothers Co.,* 258 U. S. 82; *Messenger* v. *Anderson,* 225 U. S. 436; *Luminous Unit Co.* v. *Freeman-Sweet Co.,* 3 Fed. (2d) 577 (C. C. A. 7th Circuit 1924); *Johnson* v. *Cadillac Motor Co.,* 261 Fed. 678 (C. C. A. 2nd 1919); *Rogers* v. *Hill,* 289 U. S. 582, 586–588; *Rogers* v. *Chicago, Rock Island and R. R. Co.,* 39 Fed. (2d) 601, 604 (C. C. A. 8th Circuit); *Chase* v. *United States,* 256 U. S. 1, 10; *Remington* v. *Central Pacific R. R. Co.,* 198 U. S. 96; *Riehle* v. *Margolies,* 279 U. S. 218; *American Surety Co.* v. *Bankers Saving and Loan Association,* 67 Fed. (2d) 803 (C. C. A. 8th); *King* v. *West Virginia,* 216 U. S. 92, 100.

And the same is true where a remand is justified because of new matters which have occurred since the entry of a decree by a lower court. See the por-

tion of the opinion of the Court of Appeals in the *Greenwood County case*, quoted above, page 32; see also cases cited above pages 33 to 35 and 39 to 43.

For the reasons above noted, if and when this case is remanded and the remand order is docketed, a new term will begin, and the expiration of the term, at which the earlier decree was made, will be no bar to the taking of testimony. The case of *Realty Acceptance* v. *Montgomery* has no application in such circumstances.

11. Arguments advanced by plaintiffs in other cases in which similar motions asking an order of remand have been made by this appellant and granted, indicate that appellee will probably argue as if there were something improper about the effort of P. W. A. and the city to meet objections to the old contract made by the District Court and to meet objections made to that form of contract by other courts in similar cases. Such an argument is not tenable, for P. W. A. and the city have agreed upon a new contract (to be executed, if and when the decree is appropriately modified) eliminating most of the provisions of the old contract found invalid by the trial court, *in an effort to make the contract conform, so far as possible, to the decision of that court.*

What the appellants are endeavoring to do, is, indeed, in considerable part, in compliance with the decree. They are seeking—subject to the injunction order—to enter into a new contract eliminating many of the provisions which the trial court in its opinion and decree found invalid. This does not

mean that appellants agree that the decree was in all respects correct. But, without agreeing in all respects to the correctness of that decree, this appellant and P. W. A. are trying so far as possible to comply with it.[14]

It is difficult to see how the appellants could show greater respect for the decree of the trial court. The Administrator is frank to say that he desires to make a contract which is in all respects legal, and, accordingly takes the position that, if any court finds that the provisions of this contract are illegal, it is in no way improper for him to modify them in accordance with such judicial decision. If the trial court, on the remand of this case, should find that some of the provisions of the new contract are invalid, there surely would be no impropriety on the part of the appellants, if they then sought to eliminate those provisions of the new contract. Such revisions of their contract cannot conceivably hurt appellee,

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[14] See *American Book Co.* v. *Kansas*, 193 U. S. 49. There, in quo warranto proceedings, a judgment was entered ousting a foreign corporation from doing business in the State of Kansas until it should satisfy requirements of the Kansas laws with reference to foreign corporations. After the judgment was entered, the corporation complied with the judgment. On that basis a motion was made by the State of Kansas to dismiss the corporation's appeal. The corporation answered this motion by stating, inter alia, that it had been coerced into compliance by the judgment to avoid injury from the loss of contracts to be performed in Kansas. The Supreme Court dismissed the appeal, citing *Mills* v. *Green*, 159 U. S. 651, on the ground that compliance with the judgment rendered the case moot, and that it made no difference that the corporation had complied because it felt coerced by the judgment.

since appellee will be entirely protected by the injunction decree.

Appellants are not trying to circumvent the courts, or to avoid an adjudication of the rights of appellants and appellee, or to present to this court an abstract question. The situation is exactly the contrary. They are seeking a trial based on the new contract and other relevant testimony.

The argument (advanced in other like cases) that, if the order to remand is made, the city and the Administrator may thereafter again revise their contract to comply with a new decree of the trial court to the injury of appellee, might have some weight if the appellee were being injured by the pendency of this suit, but can have no weight in view of the fact that appellants are and presumably will be enjoined from carrying out any contract pending a final decree in this suit. Such an argument was vigorously made but unsuccessfully by the plaintiff power companies in opposition to the motions to remand the cases pending in the Court of Appeals for the District of Columbia and in the Greenwood case. With that argument before them, the courts in those cases entered the orders to remand, copies of which are printed in pages 57 to 63 of the Appendix filed herewith.

The orders of remand entered by the United States Court of Appeals for the District of Columbia provided that the injunction entered by the lower court should remain in effect until the further order of the

Court of Appeals.[15] We would have no objection to a like order being entered by this court, provided the injunction be modified to permit the execution of the new contract.

In view of the foregoing considerations, we respectfully submit that this case be remanded as prayed.

James W. Morris,
Assistant Attorney General.

Alexander Holtzoff,
Special Assistant to the Attorney General.

John W. Scott,
Special Assistant to the Attorney General.

Jerome N. Frank,
Counsel for the Federal Emergency Administrator of Public Works.

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[15] In those cases, the injunction decree permitted the execution (as distinguished from the performance) of new contracts.

EXHIBITS

EXHIBIT 1

NEW PROPOSED CONTRACT

LOAN AND GRANT AGREEMENT BETWEEN THE CITY OF COEUR D'ALENE, IDAHO, AND THE UNITED STATES OF AMERICA (P. W. A. DOCKET NO. 6695)

It is hereby agreed by and between the United States of America (herein called the "Government") and the City of Coeur d'Alene, Idaho (herein called the "Applicant") as follows:

1. *Loan and Grant.*—The Government will aid in financing the construction of a water system, including sinking wells, installing pumps, and a distributing system for water service, and a Diesel engine generating plant and electric distributing system (herein called the "Project"), by making a loan and grant to the applicant in an amount not exceeding in the aggregate the sum of $650,000.

2. *Method of Making Loan.*—The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $504,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) *Obligor.*—City of Coeur d'Alene.

(b) *Type.*—Negotiable general obligation coupon bond.

(c) *Denomination.*—$1,000.

(d) *Date.*—September 1, 1934.

(e) *Interest Rate and Interest Payment Dates.*—4 percent per annum, payable semi-annually on March 1 and September 1.

(f) *Place of Payment.*—At the office of the City Treasurer Coeur d'Alene, Idaho, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

(g) *Registration Privileges.*—Registerable as to both principal and interest.

(h) *Maturities.*—Payable, without option of prior redemption, on September 1 in years and amounts as follows:

Year	Amount	Year	Amount
1936	$18,000	1946	$27,000
1937	19,000	1947	28,000
1938	20,000	1948	29,000
1939, 1940	21,000	1949	30,000
1941	22,000	1950	32,000
1942	23,000	1951	33,000
1943	24,000	1952	34,000
1944	25,000	1953, 1954	36,000
1945	26,000		

(i) *Security.*—Payable as to both principal and interest from ad valorem taxes which may be levied without limit as to rate or amount upon all the taxable property within the territorial limits of the Applicant.

3. The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make part of the grant by payment of money and the remainder of the grant by cancellation of obligations purchased pursuant to this agreement or interest coupons attached thereto. If all of said obligations are sold to purchasers other than the Government, the Government will make the

entire grant by payment of money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $175,000.

4. *Conditions Precedent.*—The Government will be under no obligation to take up and pay for any bonds which it herein agrees to purchase or to make any grant:

(a) *Financial Condition.*—If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.*—If it appears that the Applicant will not be able to complete the Project described in this agreement for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.*—If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to comply with Title II of the National Industrial Recovery Act in all respects.

5. *Interest of Member of Congress.*—No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement, or to any benefit to arise thereupon.

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6. *Bonus or Commission.*—The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.*—The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.*—The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Name of Project.*—The Applicant shall not name the Project for any living person.

10. *Grant and Bond Payments.*

(a) *Advance Grant.*—Upon execution of this agreement, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) *Payment for Bonds.*—A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the

bond transcript and other documents supporting such requisitions are complete;

(c) *Intermediate Grant Requisitions.*—Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 25 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this agreement relating thereto;

(d) *Final Grant Payment.*—At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be

an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this agreement relating thereto;

(e) *Construction Account.*—A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The grant payments, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.*—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by

the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.*—Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of the bonds purchased pursuant to this agreement.

11. *Construction of Project.*—It is mutually agreed that the Project will be constructed in accordance with the following principles:

(a) That, in order to insure completion of the Project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the Project, unless it is required by the laws of Idaho that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(b) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance in amounts reasonably sufficient to protect the contractor.

(c) That minimum or other wage rates required to be predetermined by the law of Idaho or local ordinance shall be predetermined by the Applicant in accordance therewith, and incorporated in the appropriate

contract documents. In the absence of applicable law or ordinance, the Applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the Project, and incorporate them in the appropriate contract documents.

(d) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(e) That all work to be performed under contracts to be let hereafter shall be performed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the Project. (Exhibit A has been so worded that the provisions thereof may, if the Applicant desires, be inserted verbatim in such construction contract or contracts.) If any of the provisions contained in Paragraphs 5 to 16, inclusive, of Exhibit A shall be held invalid, such invalidity shall not affect the validity and effectiveness of the other provisions of this agreement.

12. The Administrator shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project.

13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relat-

ing to said Project or to the financing or construction thereof.

In Witness Whereof, the Applicant and the Government have respectively caused this Agreement to be duly executed as of ____________________, 1936.

City of Coeur d'Alene,
By ——— ———,
United States of America,
Federal Emergency Administrator of Public Works.
By ——— ———,
Assistant Administrator.

[seal]
Attest:
——— ———.

Exhibit A

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; *Provided,* That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation:	*Hourly Wage Rate*
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(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ---------- to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ----------, should such deductions be made, shall be posted in a prominent and easily accessible place

at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.' "

3. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ____________________ and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ____________________ *Provided*, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(*b*) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide ------------------ for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The Contractor shall take out and maintain

during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

> Public Liability Insurance in an amount not less than $---------- for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $----------, on account of one accident, and Property Damage Insurance in an amount not less than $----------.

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

----

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any

contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials,

articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.*—The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls

from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendable equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the sub-

contractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

FEDERAL PUBLIC WORKS PROJECT NO. —

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing of such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the Contractor, and the contractor

and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1 (b):

And provided further.—It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations issued pursuant to so-called "kick-back statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

SECTION 1. Said Act reads as follows:

> "To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.
>
> "*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> "SEC. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during

the preceding week. Said affidavit shall be in the following form:

State of ________________
County of ________________, *ss:*
I, __________________________ (name the party signing affidavit), ________________ (Title), do hereby certify that I am (the employee of) __________________________ (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of _____________ (project) for the weekly pay roll period from the ________ day of _____________, 193__, to the ________ day of _____________, 193__, that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above-named project.

Sworn to before me this ________ day of _____________, 193__.

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

SECTION 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

SECTION 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

SECTION 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for know-

ingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

EXHIBIT 2

FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,
Washington, D. C., March —, 1936.

THE CITY OF COEUR D'ALENE,
Coeur d'Alene, Idaho.
(*Attention the Mayor.*)

GENTLEMEN: On November 23, 1934, you executed a contract sent you by Federal Emergency Administration of Public Works. Because of the institution of the suit by the Washington Water Power Company in the Federal District Court in Idaho that contract was never executed on behalf of the United States.

In August 1935 the United States Circuit Court of Appeals for the 8th Circuit decided the case of *Arkansas-Missouri Power Co.* v. *City of Kennett,* now reported in 78 Fed. (2d) 911. The Director of the Legal Division of P. W. A. subsequently called that case to my attention. It held that if the city signed a standard form of P. W. A. contract, then under the laws of Missouri the city was acting ultra vires, because the city was delegating legislative power with reference to the construction of its plant. While the correctness of that opinion seemed to be doubtful, and particularly in the possible application in other states, it seemed desirable to change our form of contract, so as to avoid the difficulties created by that decision by eliminating the features of the contract which had occasioned it. I, therefore, au-

thorized the drafting of a new form of contract to accomplish that end. Many persons in P. W. A. had to be consulted, and although negotiations with several cities began in the latter part of August 1935, it was not until the latter part of September that the new form of contract had been worked out and approved by me. It took the form of an offer for a unilateral contract. On September 25, 1935, the old contract with the City of Hominy, Oklahoma, was abrogated and an offer in the new form was made by P. W. A. to that city. The old contract was involved in a suit then pending on appeal in the Court of Appeals for the District of Columbia, entitled "*Oklahoma Utilities Co.* v. *Ickes*"; the attention of the Court of Appeals was called to the new contract by a motion made in that case, and the case was remanded to the lower court.

Meanwhile there were negotiations with other cities with which P. W. A. had contracts, and abrogating agreements were thereafter signed and new offers made.

However, in the early part of November, in connection with the writing of the brief on my behalf as appellant in the case relating to the County of Greenwood, South Carolina, pending in the Court of Appeals for the 4th Circuit, my attention was called to the findings of the District Court and to the fact that that court had entered a decree against P. W. A. in large part because of certain provisions relating to rates. Those rates provisions had not been eliminated in the new form of contract. It was then decided that our former contract should be further revised so as to eliminate those provisions, in the belief that, even if the District Court in the Greenwood case had correctly interpreted those provisions

of the contract, which we denied, the decision would be reversed as a result of the elimination of those provisions. Accordingly, I authorized work to be done on a new revised form of contract. This again took a considerable amount of time.

The first of the new contracts in the revised form to be executed was with the County of Greenwood which was executed on November 30, 1935. As there were a large number of such contracts outstanding, negotiations with you for the execution of a contract in revised form were not begun until on or about December 23, 1935, by which time a decree enjoining you and me from proceeding with the contract of November 23, 1934, had been entered by the Federal District Court and an appeal had been taken therefrom.

Since December 23, 1935, some of my subordinates have been corresponding and conferring with your representatives with a view to the execution by you and the United States of a new contract which would be subject to the injunction decree and would not be effective unless and until that decree were vacated or appropriately modified. After much consideration you decided that you would not execute such a new contract unless and until the injunction decree had been vacated or appropriately modified so as to permit its execution.

My reasons for desiring to enter into a new contract with you are not merely those which actuated me in approving the new form of contract above referred to but also the following considerations: When I authorized the contract to be sent to you, which you signed on November 23, 1934, and when certain letters and telegrams introduced in evidence in the suit now pending on appeal were sent out

by me or my subordinates, I did not have called to my attention by my subordinates, and therefore did not have in mind, the fact that your bonds were to be general obligation bonds payable out of taxes.

In a case where P. W. A. makes a loan to the city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project constructed by means of funds supplied by the United States. Under Title II of the National Industrial Recovery Act, no loans can be made which are not reasonably secured Consequently, if the sole security consists of such revenues, I am obligated in deciding whether the loan should be made, to consider the prospective earnings of the project and it is therefore necessary for me to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates that will be charged by the city's competitors, because prospective competitive rates may affect the earning power of the project and therefore the security of the loan.

Even in a case where the bonds are revenue bonds, our present revised form of contract provides that the United States shall have no rights or power of any kind with respect to the rates to be charged by the city, excepting only such rights as it may have as a holder of the revenue bonds under the laws of the State.

But where, as in your case, the loan is to be evidenced by general obligation bonds of the city, then, in determining the security of the loan, there needs to be considered merely the financial condition of the city generally and (except in unusual instances where a bad investment by the city in a project may seriously impair its finances) P. W. A. has

ignored the prospective revenues of the proposed project and therefore likewise has ignored the rates of the city and of its competitors.

As you can well imagine, I am occupied with a multitude of duties daily and occasional errors are therefore unavoidable. Because of that fact an error was made in including, in the contract with you, provisions with respect to the rates of the city; and for like reasons I approved without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of my subordinates with respect to the rates and services of The Washington Water Power Company. I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it. I reached that conclusion when my attention was first again directed to the old contract and those letters and telegrams by reading for the first time, when the case was on appeal, the opinion of the District Court in the case brought by The Washington Water Power Company. I regret that I did not read that opinion sooner, but must again explain that my multitude of duties makes it impossible for me to keep constantly and closely in touch with the very considerable number of suits in which, as Administrator, I am involved.

I then concluded that, unless a new contract could be made with you which could be justified without any regard to such considerations as the rates or services of the city or of The Washington Water Power Company, I would be obligated to rescind the allotment on which the old contract of November 23, 1934, had been based. Had I so acted, there would, of course, be no contract whatsoever, for the old contract has never been executed and is, therefore, not in

effect. Upon reconsidering the project I approved the making of a new contract with you in the form herewith enclosed. In giving that approval I have considered solely (a) whether the project would be a proper part of the comprehensive program of Public Works, (b) whether your general obligation bonds would be reasonably secured, (c) whether the project would help adequately to increase employment, and, (d) other factors required to be considered by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President. I have not given any consideration whatsoever to any other factors and especially have not considered (1) the rates which may be charged by you, (2) the rates or service of the power company, (3) whether lower power rates are desirable, (4) whether it is desirable that you should own and operate your own power plants—these all being matters for your consideration.

I have no intention of ever executing the old contract or any contract containing those terms of that contract which are not also contained in the new attached contract. My position is that I have waived irrevocably all those provisions of the old contract not set forth in the new, and have completely abandoned, and regret that there was ever expressed by or for me, any intention to have any control of any kind of your rates or any interest in the rates or services of the power company or of the city.

I feel strongly that the constitutionality of the PWA statute (affecting the lives of millions of persons) should not be determined in a case involving a proposed contract containing certain of the provisions contained in the old proposed contract, and the approval of which was based upon the consideration of improper factors, I have therefor been con-

sidering whether it would not be for the best interests of the United States that the allotment upon which your contract was based should be rescinded so that there would be no contract, in which event the case above referred to now pending on appeal would be wholly moot. Because it might be unfair to you, I have concluded that, instead of taking such a step, I will ask my attorneys to file in the Court of Appeals a motion calling attention to the facts set forth in this letter, to the proposed new contract, and to other relevant facts, and asking the Court of Appeals to vacate the decree of the lower court and remand the case in such a way as to permit the execution of the new contract and a new trial based thereon, at which trial evidence will be introduced in accordance with the foregoing.

It is my understanding that, if and when the present decree is vacated or appropriately modified, you will join with me in executing the enclosed new contract.

Harold L. Ickes,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1936